IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 513

WILLIE NORVELL,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RESPONDENT'S BRIEF.

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STATUTES AND AUTHORITIES CITED.

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RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

Petitioner's Statement of the Case (*Petitioner's Brief on the Merits*, pp. 3-9) is fair, accurate and complete in its factual substance.

But because that statement, although candid, is skillfully written in a tenor that favors petitioner, we thus distill the essence of the facts, carefully noting the respects in

which the facts in this case resemble and observing the features that differentiate this case from the decisions principally relied upon by petitioner, *Griffin* v. *Illinois*, 351 U. S. 12, (1956), *Eskridge* v. *Washington State Board*, 357 U. S. 214, (1958) and *United States ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir., 1958):

In September, 1941, petitioner, then 18 years old, was convicted (with two other defendants) upon a charge of murder, plea of not guilty and a bench trial, intervention of a jury having been waived. He was represented on the trial by counsel of his family's choice. He was sentenced to the Illinois Penitentiary for a term of 199 years.

In the language of petitioner's counsel in this court (*Petitioner's Brief*, p. 3) "At the time of his conviction, petitioner made inquiries of the Official Reporters with respect to the method and cost of obtaining the transcript of the trial, and, on his motion, the trial court extended the time for presentation and certification of the transcript for 90 days. (Tr. 2.)"

As petitioner's brief correctly notes, "A rule of the Illinois Supreme Court required that the transcript be certified by the trial judge and filed within 50 (later changed to 100) days after judgment. (Ch. 110, § 259.70A, Ill. Rev. Stat. 1939.)" (*Petitioner's Brief*, p. 3.)

Thus the instant case resembles *Griffin*, (351 U. S. 12 (1956)) in that both petitioner in this case, a pauper, and the two petitioners, both paupers, in *Griffin* made timely requests for bills of exceptions or stenographic transcripts of the proceedings at their trial *gratis*.

But this case differs signally from *Griffin* in that, although Griffin and his co-petitioner specifically made *prompt and timely* invocation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and pursued

that *timely* request to this court, petitioner never suggested any claim of a Federal constitutional right to a free transcript until November 19, 1956, shortly (7 months and 5 days) after this Court announced its decision in *Griffin but more than 15 years* after the date of his conviction and sentence and long after the death of the official Court Reporter E. H. Allen, who had inscribed in shorthand most of the proceedings at petitioner's trial, including the evidence of petitioner's confession and other evidence upon which petitioner was convicted.

The instant case is likewise similar to *Eskridge*, 357 U. S. 214, in that petitioner in the instant case and Eskridge, both paupers, requested free transcripts of the evidence upon which they were convicted. But this case distinguishes itself from *Eskridge* in that Eskridge, in this Court's language (emphasis ours) (357 U. S. 214, at p. 215), "gave *timely* notice of appeal to the Supreme Court of the State" and made prompt and *timely* application to the Supreme Court of Washington "for writ of mandate ordering the trial judge to have a transcript furnished for the prosecution of [Eskridge's] appeal" to that court.

The Supreme Court of Washington "denied this petition and simultaneously granted the State's motion to dismiss petitioner's appeal for failure to file a certified 'statement of facts' and 'transcript of record.'"

Thus Eskridge, unlike the instant petitioner, exhausted his State remedies before they were barred by lapse of time.

And the instant case differs from *Westbrook*, 259 F. 2d 215, in that Westbrook "filed a *timely* notice of appeal, asking for and receiving several extensions of time, aggregating about eight months in which to file his bill of exceptions." (259 F. 2d 215, at p. 216.)

THE QUESTION PRESENTED.

The question presented is:

PETITIONER, CONVICTED OF MURDER IN 1941, A PAUPER, DID MAKE AN INFORMAL REQUEST FOR A FREE REPORT OF PROCEEDINGS BUT DID NOT THEN INVOKE ANY CLAIM OF CONSTITUTIONAL RIGHT OR PURSUE THAT REQUEST. MORE THAN 15 YEARS AFTER HIS CONVICTION, LONG AFTER THE REPORTER'S DEATH HAD RENDERED THAT TRANSCRIPT UNAVAILABLE AND HAD MADE IMPOSSIBLE THE CONSTRUCTION OF A "BYSTANDER'S BILL OF EXCEPTIONS" PETITIONER INVOKED THE *GRIFFIN* CASE (351 U. S. 12, (1956)). THE SUPREME COURT OF ILLINOIS HELD THAT PETITIONER'S CLAIM TO A BILL OF EXCEPTIONS WAS THEN BARRED. DOES THIS HOLDING DENY PETITIONER DUE PROCESS OR EQUAL PROTECTION OF LAW?

ARGUMENT.

I.

Petitioner has not been denied due process or equal protection of the law.

The instant case presents a question that this court has never thus far considered, at least in any written opinion.[1]

That question, thus precisely delineated is:

> AN INDIGENT PRISONER CONVICTED MANY YEARS BEFORE THIS COURT'S DECISION IN *GRIFFIN*, DID MAKE SOME "REQUEST" OR OTHER EFFORT, FORMAL OR INFORMAL, TO OBTAIN A FREE TRANSCRIPT OF THE EVIDENCE UPON WHICH HE WAS CONVICTED AT THE TIME THAT HE WAS CONVICTED. BUT HE DOES NOT INVOKE THE FEDERAL CONSTITUTION EVEN IN THE TRIAL COURT, MUCH LESS DOES HE EXHAUST ANY AVAILABLE REMEDIES IN THE COURTS OF HIS STATE OR SEEK TO REPAIR TO THIS COURT, UNTIL YEARS AFTER HIS CONVICTION AND YEARS AFTER THE COURT REPORTER HAS DIED OR BECOME TOTALLY INCAPACITATED. IT HAS BECOME IMPOSSIBLE EITHER TO TRANSCRIBE THE STENOGRAPHER'S SHORTHAND OR TO RECONSTRUCT THE FAIR SUBSTANCE OF THE PROCEEDINGS AT THE PETITIONER'S TRIAL. DOES DUE PROCESS OR EQUAL PROTECTION REQUIRE THAT SUCH A PRISONER AND EVERY OTHER SUCH PRISONER BE RETRIED OR SET AT LIBERTY?

It is to this question that this brief is addressed.

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[1] Of course, we make no mention of the cases in which this question might have been presented but in which this court denied *certiorari* without opinion.

We realize that such dismissals of *certiorari* import nothing and note their possible presence only to indicate that we ignore them because they are meaningless and not because the Attorney General is not aware of them.

The principal and we think the only question fairly and really presented by this writ of *certiorari* is *not* whether *Griffin* is "retroactive" in some vague and misleading sense of that word which would restate the question as "Must every indigent State prisoner who was convicted before *Griffin* now be retried or set free if in the years intervening between his conviction and his invocation of *Griffin* the court reporter has died or become incapacitated or his notes have been lost and it is impossible to reconstruct a bystander's bill of exceptions?"

The question is whether a State denies due process or equal protection when that State's court holds that a prisoner who has thus delayed for many years any invocation of *Griffin* until after the reporter's death has not made timely exhaustion of his available and adequate State remedies and therefore no longer has if he ever had a right to be set free unless he can again be tried and convicted?

Petitioner and the hundreds or thousands of other State prisoners like him cannot extricate themselves from the following dilemma:

If as the opinion of the Supreme Court of Illinois would suggest, *Griffin* was not intended to apply to persons convicted before the date of the announcement of the opinion in that case, then *Griffin* does not apply to petitioner. But if *Griffin* is "retroactive" in the sense that it did no more than declare what was always the law, then it was the law in 1941 and if Illinois' highest courts would not have recognized that law in that year, this court would have done so upon *certiorari* or upon a direct appeal challenging as unconstitutional Illinois' statutes insofar as they discriminated against indigent prisoners in the matter of transcripts.

This dilemma is not a piece of dialectical metaphysics. It is grounded in the *supremely practical* considerations that underlie the exposition and enforcement of criminal jurisprudence and constitutional law.

Prisoners either must or they need not make timely claim of Federal constitutional rights. The mere fact that a State court may not respect those rights is no reason for not invoking them "as long as this court sits"; for otherwise there would be no basis for the doctrine of "exhaustion of State remedies" and there would be no such doctrine.

A leading and pertinent pronouncement of this court is

Darr v. Burford, 339 U. S. 201.

In the *Darr* case, the court thus stated the exigent question:

> "Petitioner Darr, an inmate of the Oklahoma state penitentiary, has been denied federal habeas corpus for failure to exhaust his other available remedies. Petitioner's omission to apply here for certiorari from the state court's denial of habeas corpus was held an error, fatal to consideration on the merits. Therefore the merits of petitioner's claims of imprisonment in violation of the Constitution are not before us. The petition for certiorari requires us to pass solely upon the correctness of the lower court's view that ordinarily a petition for certiorari must be made to this Court from a state court's refusal of collateral relief before a federal district court will consider an application for habeas corpus on its merits." [Darr contended, *inter alia*, that a plea of guilty had been extorted from him by unconstitutional coercion.]

This court said at page 217:

> "* * * It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

To be sure *Darr* reached this court through Federal appellate hierarchy from a denial by a United States District Court of a writ of *habeas corpus*, that denial being grounded solely upon failure to exhaust State remedies, whereas the instant case is here upon *certiorari* directed directly to the State's highest court.

But Illinois' highest court denied relief in this case, not upon the ground that petitioner would not have been entitled to a free transcript had he made *timely* claim of a Federal constitutional right to that transcript as did Griffin, Eskridge and Westbrook, but upon the ground that, no such application having been made, petitioner's conviction has become final.

Another important and pertinent utterance by this court occurs in

Brown v. Allen, 344 U. S. 443.

In *Brown*, "the records raised serious federal constitutional questions upon which the carrying out of death sentences depended and procedural issues of importance in the relations between states and the Federal Government upon

which there was disagreement in this Court." (344 U. S. 446, at p. 447.)

In *Brown*, this court respected the right of a State to refuse appellate review, even in a case where the death sentence was imposed and the defendants were represented by counsel appointed by the court, not by counsel of their own choice, where those counsel failed to file a timely notice of appeal and there was no suggestion of covin or collusion with state officials.

The court said at pp. 484-5:

> "The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of time. This action precluded an appeal as of right to the State Supreme Court."

After discussion of the scope of Federal *habeas corpus*, the court returning to its consideration of North Carolina's dismissal of the appeal, said at page 486:

> "North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. *Preston* v. *Texas*, 343 U. S. 917, 933; cf. *Paonessa* v. *New York*, 344 U. S. 860, *certiorari* denied because 'application therefor was not made within the time provided by law.' We cannot say that North Carolina's action in refusing review,

> after failure to perfect the case on appeal violates the Federal Constitution. *A period of limitation accords with out conception of proper procedure.*" (Emphasis supplied.)

The decision of the Supreme Court of Illinois does *not* rest on any view that *Griffin* was "prospective only" and not "retroactive"; for the Supreme Court of Illinois said in its opinion in this case (*Appendix*, p. 3):

> "We had, of course, already removed financial barriers which prevented indigent defendants sentenced prior to the *Griffin* case from now securing free transcripts if it is possible to obtain them. Ill. Rev. Stat. 1957, chap. 110, par. 101.65-1 (2)."

Hence, since Illinois had "*already* removed financial barriers which prevented indigent defendants sentenced prior to the *Griffin* case," no question of the "prospective" or "retroactive" effect of *Griffin* was decided by, involved in or pertinent to this case.

It is clear from a reading of the opinion of the Supreme Court of Illinois in the instant case that what that court held and all that it held was that an indigent prisoner who waits many years after his conviction and until long after the death of the court reporter who inscribed these shorthand notes of his trial is not entitled to freedom if the State cannot convict him upon a trial *de novo*.

This holding, we submit does not present a substantial Federal constitutional question. But if the question be deemed substantial, it should be resolved in affirmance of the judgment of the Supreme Court of Illinois in this case.

Conclusion.

For the reasons suggested in this brief, it is respectfully submitted either that, upon plenary consideration, the writ of *certiorari* should be dismissed as improvidently granted, no substantial Federal question appearing, or that if the only question involved is deemed substantial, that question should be decided in favor of Illinois.

Respectfully submitted,

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